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PERMANENT SELECT COMMITTEE
ON INTELLIGENCE
WASHINGTON, D.C. 20515

OLC #81-0395A

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March 19, 1981

Honorable Warren E. Burger
Chief Justice of the United States
Supreme Court of the United States
Washington, D.C. 20543

Dear Mr. Chief Justice:

We are writing to express our views on the security procedures which were submitted to the Congress on February 23, 1971 pursuant to section 9(a) of the Classified Information Procedures Act. As you know, the Committees which we chair share jurisdiction over this Act.

Generally, we consider the proposed procedures to be an effective and reasonable response to the statutory direction to establish procedures for the protection of classified information physically in the custody of the federal courts.

We are of the opinion, however, that certain aspects of the procedures may extend beyond those areas which the Congress intended the procedures to cover. The legislative intent in this area is set out on page 30 of the Report of the House Permanent Select Committee on Intelligence (H.Rept. 96-831, Part 1 to accompany H.R. 4736):

The Committee wishes to emphasize that the security procedures required by section 110 are meant to deal with such matters as how and where classified documents are to be stored, what court personnel will have access to them, security clearances for court personnel, and related matters. Issues of particular effect on the trial process and the rights of defendants such as defense access to classified materials, are to remain within the province of the individual trial judge and the judge's authority to issue protective orders.

Sections 5 and 11 of the procedures could be interpreted to extend beyond matters related to the physical safekeeping of classified documents and to impinge upon areas of "particular concern to the trial process".

On its face, section 5 purports to authorize the government to obtain information about defense counsel. We question the need for and the propriety of such a provision. To the extent that it purports to authorize any activity by the government that is not now authorized, it is beyond the proper scope of the security procedures. To the extent that it may be premised on the government's desire to "clear" defense personnel, section 5 surely relates to "defense access to classified documents". To the extent

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that its purpose is to approve "lawful" activity by the government in gathering information, and communicating it to the court, it is superfluous and thus adds confusion to the procedures.

Section 11 can be construed to authorize the Department of Justice Security Officer or executive branch agencies to determine the disposition of portions of the record of the case which contain classified information. Presumably, such a construction is not intended; the usual rules regarding the length of time the record of a case is preserved will apply, and section 11 pertains only to where that part of the record of a case containing classified information is to be stored. However, this latter construction is not at all clear from a reading of the section.

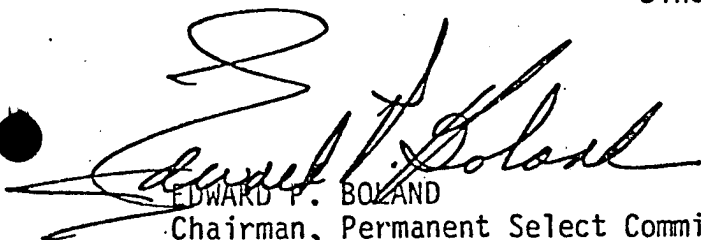
A third provision that is troubling to us is contained in the second paragraph of section 9(a), which requires that "every document filed by the defendant in the case shall be filed under seal and promptly turned over to the court security officer". In this regard, we would note with approval the comments of Mr. Philip Lacovara:

In addition, in the second paragraph of Section 9 (page 7) there is an ambiguity that I would have corrected. That paragraph directs that every document filed by the defendant "in the case" shall be filed under seal, but I have had trouble determining how covered cases will be identified. Presumably, this directive applies only in cases in which a court security officer has been appointed and in which that fact has been called to the defendant's attention.

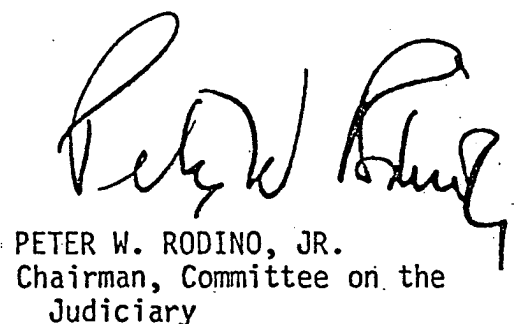
Even in cases where a court security officer is appointed, however, it may be utterly unnecessary to go to the extreme of immediately sealing all defense filings (but not necessarily all prosecution filings). This seems like overkill, and I would have left the formulation of specific confidentiality orders to the trial judge.

Because we believe that the procedures in question may exceed the scope contemplated by the Congress, we urge their reexamination. Our concern -- which we invite you to allay -- is that the procedures, as they now stand, may take from the trial court decisions going to the heart of the adversary process. Such decisions ought to be weighed by judges in the context of individual trials.

Sincerely yours,



EDWARD P. BOLAND
Chairman, Permanent Select Committee
on Intelligence



PETER W. RODINO, JR.
Chairman, Committee on the
Judiciary